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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF

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SEPTEMBER, 1943.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hazel-Atlas Glass Company respectfully petitions for a writ of certiorai directed to the circuit court of appeals for the third circuit, to review a judgment of that court entered on June 30, 1943 (R. 266). The opinion of the court, filed on the same day, by Circuit Judge Jones, Circuit Judge Maris concurring, and a dissenting opinion by Circuit Judge Biggs, are in the record (R. 240, 251), and are unofficially reported in 58 U. S. P. Q. 348, 355.

A transcript of the record in the case, including the proceedings in said court, is furnished herewith in accordance with Rule 38 of this Court.

A petition for a writ of certiorari to the same court will be filed within a few days in the companion case of *Hartford-Empire Company* v. *Shawkee Manufacturing Company et al.* (*infra*, p. 11).

Summary Statement of the Matter Involved.

The judgment here sought to be reviewed is a judgment by the third circuit court of appeals, denying a petition to that court to vacate a 1932 decision by that court, because of fraud practiced on it. Petitioner here was the defendant in a suit brought in the district court for the western district of Pennsylvania by the respondent, Hartford-Empire Company (hereinafter called Hartford Company or Hartford) for alleged infringement of a Peiler patent 1,655,391, owned by respondent. Hartford claimed that the patent covered certain machines, called feeders, used by petitioner (hereinafter called Hazel or the Hazel Company) in manufacturing glass containers, such as glass bottles.

The district court decided for defendant on the ground that the patent was not infringed, *Hartford* v. *Hazel*, 39 F. 2d 111 (per Judge Gibson). The third circuit court of appeals on May 5, 1932 reversed, deciding for Hartford and finding the patent valid and infringed, *Hartford* v. *Hazel*, 59 F. 2d 399, Circuit Judge Buffington writing the opinion, Circuit Judge Davis concurring, and Circuit Judge Woolley dissenting with opinion.

The opinion of Judge Buffington shows on its face that it was greatly influenced by a published article of one

Clarke, in overruling the finding of the trial judge, which was that the earlier patents and work by others, testified to by witnesses whom he saw and heard, limited the scope of the patent so that the Hazel feeders did not infringe. This article had appeared in the principal magazine of the glass industry, and purported to have been written by the president of a glassworkers union, who made various statements concerning the nature and operation of machines.

The facts concerning this article were first revealed in the summer of 1941, by the government then introducing, at the trial of the *Glass* antitrust suit in Toledo, letters between the Hartford and Owens* companies, which were obtained from their confidential files by the government, and by the testimony at that trial of Hatch and Naylor, employees of those companies, whom the government subpoenaed and examined. Those proofs showed:

On December 11, 1925 a Hartford lawyer wrote to a lawyer for the Owens company, which was then associated with Hartford in the latter's patent matters, suggesting the writing of an article concerning the "plunger gob feeding system" and that "the importance of this matter lies in the fact that we must soon make a record before the Patent Office in connection with the principal Steimer case *and also in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger*"† (R. 57). The *Peiler* case was the application for the patent in question, which at that time had been rejected by the patent office. This was approved by the Owens people, and, as appears

*Owens Bottle Company, later Owens Illinois Glass Company.

†Emphasis ours throughout.

from the May 25, 1926 letter of an Owens lawyer (R. 60), Hatch, a Hartford patent attorney, wrote the article "with the idea of getting it printed under the name of *some apparently unprejudiced authority*, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims. Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published". Hatch first asked the president of the Glass Blowers Association, Maloney, to father the article, and when he refused, got Clarke, the president of the other glass workers union, the American Flint Glass Workers Union, to do so (R. 60).

The article was published under Clarke's name in the National Glass Budget of July 17, 1926, this being the trade magazine for the glass industry, and was then submitted to the patent office, where the patent claims were under rejection (R. 60). The claims were thereafter allowed, the patent issuing.

At the trial in the district court in 1929 of the patent suit against Hazel, the Clarke article was not offered in evidence by Hartford, nor was there any mention of it made during that trial, in testimony or briefs. However, the voluminous 745 page patent office history of the patent was introduced in evidence as an exhibit, and the article was one of the numerous papers in that exhibit, which also included other *ex parte* statements in books, articles and affidavits. There never was in the trial court any attempt by Hartford to rely upon the Clarke article, nor even any mention of it. The trial judge decided against Hartford, because of his conclusions concerning what the prior

patents showed in the light of the testimony by the witnesses before him.

But on appeal, Hartford referred to the Clarke article in its brief, quoting from it, with the hoped for result of poisoning the minds of at least a majority of the court, so that the evidence in the record and the findings of the district court were rejected for the apparently disinterested statements of union officials.

The opinion of Judge Buffington said (59 F. 2d 399):

> "As we have indicated, the *labor organizations* were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. *We can therefore, and do, rely on their opinion in that regard, for successful machine blowers largely spelled ending of the supremacy of lung blowing. In an article prepared by the president of one of these unions,* he said:" (p. 401)

> "It is interesting to note that in that connection the trade, *these labor organizations of practical workmen,* recognized the fact * * * *In that respect the article already quoted*" (p. 403)

> "When the change was made, its significance was at once recognized by the glass workers in *words which were used by one president of the Glass Blowers' Union and repeated by another* as follows:" (p. 404)

"We shall later see that in these few words *this practical glass blower official* summarized the novel characteristics of the machine which is the subject-matter of this suit." (p. 404)

"In the practical work of that part of the glass-blowing art here involved, we regard Owens and Brooke as the only devices which caused any concern to the *Glass Blowers' Union*. Whatever steps other inventors took, certain it is they had no effect so far as supplanting hand blowing by machine blowing." (p. 406).

"The periodic, separated, individualized mold forms or gobs discharged by this current-intercepted process and its contrast with the continuous feed stream of the earlier art are described by the *union official* just referred to * * *" (p. 407).

"In point of fact, the independent operators who were threatened with annihilation by the Owens device, found nothing in this swarm of alleged patent anticipations to relieve them, and *the labor conventions* asserted, as they did, that none of these alleged prior devices had any effect. We may safely assume these futile devices did not enter into the situation then and should not now, because their worth and alleged pertinence is based on fiction without support of fact." (p. 412).

"And where an art, eager for relief, found in these moribund patents nothing to meet that suggested solution, *it is safer to rely evidentially on the then judgment, attitude, and conduct of the glass trade*

rather than on the post litem testimony of experts, the contentions of infringers, and the theoretical construction that often tempts courts to create out of lifeless patents an imaginary machine on paper which a working art could not do in steel" (p. 413).*

Upon the opinion coming down, the Hazel Company endeavored to obtain proof that the Hartford Company was responsible for the article. Hazel had been told in 1929 by the Woods, Cincinnati lawyers, that Clarke in 1926 and Hatch in 1928 had separately said to them that Hatch had written the article, but this was purely hearsay, and, further, there was no suggestion that the Hartford and Owens concerns had authorized this action to influence the patent office. However, the Hazel Company employed a McCarthy firm of investigators, McCarthy immediately communicating with the Woods, Maloney who was the first labor official whom Hatch asked to sponsor the article, and then Clarke. But he did not see Clarke until after Hatch had gone to Toledo and seen Clarke on May 10. On May 13, when the Hazel investigator did see Clarke in Toledo, the latter insisted that he, not Hatch, had written the article, and when confronted with Wood's letter that Clarke in 1926 had said the contrary, declared he had no recollection of so saying (R. 32). However, Clarke did say he had some records which he would show McCarthy at the next interview. On the same day, and undoubtedly after this interview, Clarke telephoned to Naylor of the Owens Company, who telephoned to Hatch (R. 61, 62), and when on May 24th McCarthy again saw Clarke, the latter refused to produce the records, refused to "sign any statement at

*The majority of the court below thought that the Clarke article was not material to the decision (R. 240), but Judge Biggs shows conclusively that this is not so (R. 255-260).

the present time regarding the circumstances under which the article was written", and said he had "worked on that article for seven weeks before I signed it in Philadelphia" and "I wrote that article in the interest of the general public" (R. 34, 35). On July 22nd Hatch paid Clarke $500, and on August 11th paid him $7,500, both payments being by cash and not by check (Hatch, R. 55, 56, 90), and Clarke told Hatch,

> "he felt that we were under a certain obligation to him on account of the work that he had done in connection with this Clarke article, and other things; he had been bothered somewhat by investigators" (Hatch, R. 53).

The payment was in 1932, six years after the article appeared in a 1926 issue of the National Glass Budget.

The majority opinion (R. 244) says that the Hazel investigator did not interview Hatch, the Hartford patent attorney, to see if he would contradict Clarke, but this would have been a vain task, as Hatch was then and is still in Hartford's employ, and both still insist that it was Clarke's article except for a few unimportant details.

Hazel in 1932 had only the oral statements of the Woods as to what they remembered had been told them in 1926 and 1928, and that Hatch had transmitted the article to the magazine for publication. This was plainly insufficient, especially on a motion for rehearing after the thorough consideration which had been given to the case by the three judges, as evidenced by the majority and the dissenting opinions. In *Ward* v. *Ward*, 2 Cir., 149 Fed. 204, a motion to stay a mandate was denied "if for no other reason because the alleged newly discovered evidence is merely hearsay testimony, and would be inadmissible if objected to, and

entitled to no weight if received without objection". The minds of the judges had been poisoned, as shown by what later transpired in the *Shawkee* case, where the Shawkee defendants petitioned the same court for rehearing on the ground that the Clarke article had been instigated and published by Hartford (*infra*, p. 12).

Faced with this situation, Hazel decided to make the best terms it could with Hartford, entered into a July 1932 license agreement with it, and on August 2, 1932, a decree was entered in the district court in accordance with Judge Buffington's opinion.

In the summer of 1941, the trial of the *Glass* antitrust case in Toledo, which case is now on appeal to this Court, disclosed for the first time to Hazel the newly discovered evidence here relied upon, and on November 19, 1941, Hazel filed a petition in the court of appeals for leave to file a bill of review in the district court, that its decree might be vacated, on the ground of newly discovered evidence of material fraud.

Acting upon the Hazel petition, the third circuit court of appeals on December 29, 1941 filed an opinion stating (R. 169):

> "In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the companion case of *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. (2nd) 940 and 944, certiorari denied 308 U. S. 621, and itself pass upon the question of whether the mandates of this court should be recalled and the cases reopened. Accordingly the prayers of the peti-

tions as framed are denied but leave is granted to the petitioners to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud. The plaintiff-appellant will then reply to the petitions for review as amended and the questions involved will be heard and determined by this court".

On January 6, 1942 Hazel filed an amendment to its petition, in accordance with the above suggestion, as follows (R. 173):

"1. That this Court, on the ground of fraud, vacate, set aside and annul its decision and decree entered on or about May 6, 1932, reversing the decree of the district court for the western district of Pennsylvania; recall the mandate issued pursuant to said decision and decree, and vacate, annul and set aside all proceedings had pursuant to said mandate, including the entry of the final decree filed in said district court on or about August 2, 1932; reinstate the decree of said district court entered on or about March 31, 1930; and restore this cause to the docket of this Court for reargument upon the original briefs filed herein or upon such supplemental briefs as the parties may wish to file, and fix the time for the filing of such briefs and reargument.

"2. For such other and further relief as may be just, including such relief and leave as may be appropriate to take proceedings in this Court or in said district court for setting aside and vacating on the ground of fraud said decision and decree of this Court, and the proceedings had and decree entered in the district court pursuant to the mandate of this Court issued on its said decision and decree".

Thereafter the court of appeals heard the matter on the petition as amended, and on June 30, 1943 made the decision here complained of.

As appears from the opinion of the court below, there was a similar proceeding brought by the Shawkee Manufacturing Company and others, based on the same grounds, and which the court also decided in favor of Hartford, on the same grounds that the court decided against Hazel, *i.e.*, lack of power to grant the requested relief, immateriality of the fraud (found by both opinions to have been practised by Hartford), and laches. The Shawkee defendants also are petitioning this Court for a writ of certiorari, and the questions presented by that petition are the same as the one here presented with respect to the power of the court below and the materiality of the fraud, and similar as to laches.

The majority of the court held that a court of appeals is without power to remedy a fraud practised on it, after the term has expired. The reasons why this is not so are stated in the dissenting opinion of Judge Biggs.

The materiality of the fraud depended upon whether the fraud affected the decision of the court, and the evidence on that point consisted of the opinion of Judge Buffington, which seemed to Judge Biggs, as it does to us, to establish the materiality, although the majority of the court below thought it did not.

As for laches against Hazel, the original decision by the court of appeals in favor of Hartford and against Hazel was in May, 1932, at which time Hazel believed, on the basis of some hearsay, that Hartford had written the Clarke article, but had no proof sufficient for the granting

of a rehearing nor a reasonable prospect of getting any, especially as all the evidence was in the camp of the enemy. Shawkee was in substantially the same position as Hazel. The suit against it was also in the third circuit, being filed in 1933, and was decided by the court of appeals on January 11, 1943, *Shawkee* v. *Hartford*, 68 F. 2d 726, largely on the basis of that court's decision in the *Hazel* case. Shawkee prior to such decision was advised that Hartford was responsible for the Clarke article, but had no more proof than Hazel had had. However, Shawkee presented this, and other matters, to the court of appeals in a petition for rehearing which was denied, 73 F. 2d 1013; this Court then denied Shawkee's petition for certiorari, 292 U. S. 640; and after further proceedings in the case, Shawkee also took a license from Hartford. Like Hazel, Shawkee had no knowledge of the proofs introduced by the government in the trial of the antitrust suit before they were introduced.

The Shawkee petition to the third circuit court of appeals was filed about the same time as the Hazel petition, and the proceedings and results in the Shawkee and Hazel proceedings in the court below, as to which the present petitions by Shawkee and Hazel are directed, have been the same.

Questions Presented.

1. Did the court of appeals for the third circuit have the power to remedy a fraud practiced upon it, after the term of court, in which the decision obtained by fraud was made, had expired?

2. Whether the fraud practiced upon that court was material to its decision?

3. Was there laches by petitioner in presenting to that court the evidence which established the fraud, which should have prevented the court from setting aside its former decision in favor of Hartford that the patent was valid and of broad scope?

Reasons Relied Upon for the Granting of a Writ of Certiorari.

1. The decision of the circuit court of appeals for the third circuit, that a court of appeals lacks the power to correct its decision obtained by fraud practised on it, after the term of court, in which the decision was made, had expired, is in conflict with decisions of the second circuit court of appeals.

2. The third circuit court of appeals has decided an important question, concerning the power of circuit courts of appeals to remedy frauds practised on them, in a way which is in conflict with the applicable decisions of this Court.

3. The question of whether or not circuit courts of appeals have such power to remedy frauds practised on them, when there has been no fraud in the court below, is a jurisdictional question of great importance to the administration of justice that should be settled by this Court.

4. The decision by the court below in refusing to reexamine and decide the validity and scope of the alleged inventive work by Peiler, which was a matter of great public importance, was wrong, constituted palpable error apparent on the face of the opinion below, and should be corrected.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court

directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may seem proper.

STEPHEN H. PHILBIN,
HENRY R. ASHTON,
Counsel for Petitioner.

September, 1943.

IN THE

SUPREME COURT OF THE UNITED STATES

No.....

HAZEL-ATLAS GLASS COMPANY,

Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions of the Court Below.

The opinion of the circuit court of appeals for the third circuit, and dissenting opinion, are in the record (R. 240, 251), and are unofficially reported in 58 U. S. P. Q. 348, 355.

Jurisdiction.

The date of the judgment is June 30, 1943 (R. 266). The statute under which jurisdiction is invoked is Section 240(a) of the Judicial Code, 28 U. S. C., Section 347, as amended.

Cases believed to sustain the jurisdiction are *Powers-Kennedy Contracting Corp.* v. *Concrete Mixing, etc., Co.*, 282 U. S. 175, 176; *Saranac Automatic Mach. Corp.* v. *Wirebounds Patent Co.*, 282 U. S. 704, 705; *U. S. Indus-*

trial Chemicals v. *Carbide and Carbon Chemicals*, 315 U. S. 668, 669; *Southland Gasolene* v. *Bayley*, 319 U. S. 44; and *Aguilar* v. *Standard Oil*, 318 U. S. 724, 726, where there were conflicts of decisions. Also, this Court has granted certiorari where there was no conflict, but the questions presented were important, *De Forest Radio Co.* v. *General Electric*, 283 U. S. 664; *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759; *Williams Mfg. Co.* v. *United Shoe Machinery*, 316 U. S. 364; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Reynolds* v. *United States*, 292 U. S. 443; *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315; *United States* v. *Socony-Vacuum Oil Co., et al.*, 310 U. S. 150; *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, etc.

Statement.

The facts, so far as this application is concerned, are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioner will urge, if a writ of certiorari is granted, are that the majority of the circuit court of appeals for the third circuit erred in holding:

1. That the court of appeals for the third circuit did not have the power to remedy a fraud practised upon it after the term of court, in which the decision obtained by the fraud was made, had expired.

2. That the fraudulent Clarke article upon which that court relied was not material to its decision.

3. That there was laches by petitioner in presenting to that court the evidence which established the fraud, and that such laches prevented the court from setting aside its former decision in favor of Hartford that the patent was valid and of broad scope.

Summary of Argument.

The points of argument follow the reasons relied upon for the allowance of the writ.

Argument.

The merits of this case are presented in the majority and dissenting opinions, and also in the petition (*supra*, pp. 2 to 12).

POINT I

There is a conflict between decisions of circuit courts of appeals.

The conflict between the decisions of the circuit court of appeals for the third circuit and the second circuit is direct and complete. The second circuit court of appeals held that a court of appeals had power to correct its erroneous decision, obtained by fraud, after the expiration of the term during which the decision was rendered.

The second circuit court of appeals in the *Art Metal* cases, 107 F. 2d 940 and 944, considered in 1939 attacks upon their prior judgments entered in 1934, which was long after the terms in which the judgments were made had expired, and set them aside on the ground of newly discovered evidence of fraud practised upon the court.

In that case, the fraud consisted of one of the parties biasing one of the three judges, so that the hearing and decision were not fair. The orders entered by the court in 1939 setting aside the former judgments and restoring the cases to the docket for reargument, etc., are in the record (R. 175, 177). The only difference between the *Art Metal* cases and the present case is the immaterial one that in the *Art Metal* cases one of the judges was a conscious party to the fraud, whereas in the present case the two judges prejudiced by the fraud were unconscious of it. However, the prejudicial effect of the fraud was the same, *viz.*, to prevent a fair hearing. Thus the decisions are substantially indistinguishable.

POINT II

There is a conflict with decisions of this Court.

The decision of the third circuit court of appeals is in conflict with *U. S.* v. *Throckmorton*, 98 U. S. 61, and *Marshall* v. *Holmes*, 141 U. S. 589, which decided that a judgment obtained by fraud may be set aside after the term in which the judgment was entered has expired.

In the *Throckmorton* case, the bill to set aside a decree obtained by fraud was filed more than 20 years after the decree was rendered. This Court said "There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments" (p. 64), and that such a bill will lie

> "in cases where by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented

from exhibiting fully his case, by fraud or deception practised on him by his opponent, etc., relief has been granted" (pp. 65, 66).

The ground for this is

"that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed" (p. 66).

The fraud "practised directly upon the party" has come to be called "extrinsic" fraud, and the second kind of fraud "intrinsic". The distinction is nice, and its soundness has been questioned in textbooks and by the courts. *Publicker* v. *Shallcross*, 3 Cir., 106 F. 2d 949, 951; *Park* v. *Park*, 5 Cir., 123 F. 2d 370, 372; *Raymond* v. *Wickersham*, CCPA., 129 F. 2d 522, 526; *Brady* v. *Beams*, 10 Cir., 132 F. 2d 985, 986. In this last decision, the court said that the line of distinction between intrinsic and extrinsic fraud—

"is sometimes indistinct and difficult to draw; dialectic niceties have sometimes been used in an effort to blueprint it; and tenuous differences have occasionally been sketched. Broadly stated, fraud practiced by a successful litigant which prevents his unsuccessful adversary from fully exhibiting his case, such as wrongfully preventing him or his material witnesses from attending the trial, inducing his attorney to professional delinquency or infidelity in

> connection with the case, or some other similar act, unmixed with fault or negligence on the part of the losing party, constitutes extrinsic or collateral fraud; and the introduction of perjured testimony or forged documents, or other cognate matter, which is actually considered in the judgment constitutes intrinsic fraud. *United States* v. *Throckmorton, supra; Vance* v. *Burbank,* 101 U. S. 514, 25 L. Ed. 929."

Marshall v. *Holmes,* 141 U. S. 589, appears to overrule the *Throckmorton* decision, because the fraud in the *Marshall* case was "intrinsic", consisting of "false testimony and forged documents" (pp. 590, 592). The suit was to set aside a judgment, because of such fraud, and was filed in a Louisiana state court, after the term had expired. The plaintiff petitioned for removal to the federal court, which was denied and the decision was against the plaintiff, a writ of error being then prosecuted to this Court. It was said by this Court (p. 601) that the trial court might grant relief

> "by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner."

The inconsistency between this decision and that in the *Throckmorton* case is pointed out in *Publicker* v. *Shallcross,* 3 Cir., 106 F. 2d 949, 951.

However, whether there be a substantial and workable difference between "intrinsic" and "extrinsic" fraud, there was extrinsic fraud in the present case.

In the present case, the fraud was "extrinsic", because Hazel was prevented "from exhibiting fully" (*Throckmorton* opinion, *supra*) its case. The fraudulent Clarke article was not considered in the judgment of the district court, and, indeed was not before that court as evidence. Hartford introduced the Clarke article into the trial against Hazel as an apparently innocent part of the voluminous patent office history of the Peiler patent, but did not offer the article itself nor make any mention of it in the trial court. There was nothing for Hazel to meet at the trial. By this action on the part of Hartford, Hazel could not attack the Clarke article in the court of appeals when Hartford there for the first time called attention to and relied upon it, on any ground other than its incompetency as proof of the truth. After the apparently innocent and disinterested article had been read by Judges Buffington and Davis, whose minds it poisoned, naturally they ignored the technical although sound argument by Hazel that it was incompetent.

In addition, Hazel was prevented, after Judge Buffington's opinion appeared on May 5th, from obtaining proof that Hatch of the Hartford Company, and not Clarke, had written the Clarke article, by Hartford getting first to Clarke.

So, even if the *Throckmorton* rule be applied, instead of the *Marshall* v. *Holmes* statement, the court below should have set aside the fraudulently obtained decision, and its failure to do so was in conflict with both.

POINT III

Whether or not circuit courts of appeals have the power to remedy frauds practised on them by setting aside their former decisions, when there has been no fraud in the court below, is a jurisdictional question of great importance to the administration of justice that should be settled by this Court.

This question has never been decided by this court and its importance to the orderly administration of justice is apparent.

Where, as here, fraud is practised on a circuit court of appeals, and there has been no fraud in the court below, it is clear that the aggrieved party is deprived of a fair hearing unless the court of appeals has the power and jurisdiction to inquire into the fraud.

As stated by Judge Biggs, in the dissenting opinion below:

> "The significant fact is that the fraud was worked upon the appellate tribunals" (R. 253).

And:

> "The fraud is one which was worked, as I have stated, upon our appellate jurisdiction. It came within the ambit of this court on appeal. That fraud can be relieved of only by the exercise of our appellate jurisdiction precisely as the fraud worked upon the Court of Appeals for the Second Circuit can be cured only by that tribunal. If we do not exercise our jurisdiction the petitioners will be without relief from the fraud practiced upon this court. If fraud effected our decree at No. 4414, this court as a matter of justice should grant rehearings both at No. 4414 and at No. 5203" (R. 255).

POINT IV

The decision below, on a matter of great public importance, was wrong and constituted palpable error apparent on the face of the opinion.

The 1932 decision of the circuit court of appeals held that Peiler, the Hartford patentee, had made great, revolutionary inventions in the glass industry, and sustained his patent which was before it in the suit as being valid and entitled to a broad scope. This judicial appraisal of what Peiler had done was of great importance, not only to the litigants, but also to the public generally, because thereby the Hartford patent rights were strengthened for use against other manufacturers or users of the kinds of machines complained of. And this extended not only to the particular Peiler patent before the court, but also to other Peiler patents. In *Hartford* v. *Coe* (1936) C. C. P. A., 87 F. 2d 741, a Peiler application for patent was allowed, of the same general nature as the patent here involved, the circuit court of appeals for the district of Columbia citing with approval Judge Buffington's opinion, especially that part in which he quotes the words of "the union official" (p. 743). Thereby, the Hartford Company obtained the issue in 1937 of a patent on a Peiler application filed in 1914, and which patent is even broader than the Peiler patent here in question.

As said in the dissenting opinion below by Judge Biggs (R. 265):

> "there is a duty to protect the public from an unwarranted monopoly imposed by a patent. Quite aside from this, however, we have the duty to preserve the integrity of our appellate jurisdiction against fraud. As I see the facts, action upon that duty is clearly imposed upon us by the petitions at bar."

To hold, as did the court below, in a matter of such public importance, that it was without power to remedy a fraud practised upon it constitutes error apparent on the face of the opinion below.

The certiorari jurisdiction of this court is "coextensive with all possible necessities", *Forsyth* v. *Hammond,* 166 U. S. 506, 514, and the precedents establish the propriety of the issuance of the writ where the decision of the circuit court of appeals is untenable on its face. See *Reynolds* v. *United States,* 292 U. S. 443, 446, 447; *Southern Railway Co.* v. *Walters,* 284 U. S. 190; *Stringfellow* v. *Atlantic Coast Line R. Co.,* 290 U. S. 322, 326; *McCandless* v. *United States,* 298 U. S. 342. And the use of certiorari jurisdiction to correct error of this character is recognized by the rules of this Court (Rule 38, par. 5(b)). It is founded upon the fact that it is in the interests of the law, not merely the interests of the parties, that decisions of lower federal courts shall not be permitted to stand uncorrected where there is on the very face of the opinion written to support the judgment, the showing that in law the judgment is wrong.

In the interests of due administration of justice the patently erroneous decision of the court below should not be permitted to stand.

Summary

The opinions below show plainly that the majority of the court of appeals were wrong with respect to their conclusions.

A court has inherent power to vindicate and protect its existence and powers, and where a fraud upon it resulted in a decision of importance not only to the parties, but to

the public generally, as is true of patent cases, the court has power to set aside the fraudulently obtained judgment at any time thereafter.

The fraudulent Clarke article poisoned the minds of Judges Buffington and Davis, with the intended result that they disregarded the findings of the trial court that the prior art so limited the Peiler patent that it was not infringed. This plainly appears from a reading of Judge Buffington's opinion, as pointed out in the dissenting opinion below of Judge Biggs.

There was no laches on the part of either Hazel or of Shawkee, because, although they suspected and believed that Hartford was the author of the article, and Shawkee even so represented to the court of appeals in its case, neither Hazel nor Shawkee had any proofs to such effect until they were brought out in the government antitrust suit in Toledo, three months before Hazel and Shawkee filed their respective petitions in the court below. As stated by Judge Biggs in the dissenting opinion below:

> "Knowing that something is the fact and possessing the ability to prove it are two very different things" (R. 261).

The petition for a writ of certiorari to the circuit court of appeals for the third circuit should be granted.

Respectfully submitted,

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